

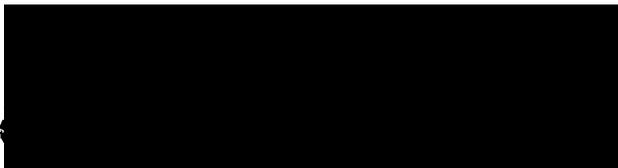
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U.S. Citizenship
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FILE: WAC 04 015 53231 Office: CALIFORNIA SERVICE CENTER Date: APR 21 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a home health services company that seeks to employ the beneficiary as a Medications Monitoring Supervisor. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that the proffered position was not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's RFE response; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a Medications Monitoring Supervisor. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying Form I-129; the company support letter; the petitioner's RFE response; the Form I-290B; and the appellate brief accompanying the Form I-290B. The addendum to the petitioner's Form I-129 set forth the following description of the duties of the proposed position:

- Review and verify patients' medication profile[s] that should include drug indications/contraindications, correct dosage[s], special precautions, adverse reactions, drug interactions, side effects[,] and proper administration.
- Provides [sic] other drug information as appropriate.
- Review each patient's medication profile, and discuss the same with the licensed pharmacist or patient's attending medical doctor before completion of plan of care.
- Responsible for monitoring all medication through the report of field nurses during patient's start of care or evaluation[,] and carefully checking...[to determine whether there is] new medication after each patient's recertification or patient's resumption of care.
- Reports [sic] any problems in patients' medication[s] to DOPCS (Director of Patient Care Services) or Nursing Supervisor.
- Continuous monitoring of staff performance with proper filing of documents in the chart[,] especially [the] medication profile[s].
- Direct [the] supervision [of,] and train assigned staff...[on,] follow up and guidance.
- Weekly quality improvement monitoring of patient care chart[s] and staff performance.
- Follows [sic] established departmental policies, procedures, and [sic] objectives, and safety.
- Performs [sic] miscellaneous job-related duties as assigned.

The petitioner's letter of support reiterated the duties listed in the addendum to Form I-129, and noted that a successful applicant for the proposed position would be required to possess a bachelor's degree in pharmacy or a related field.

The director issued an RFE, requesting further evidence to support the contention that the proposed position is in fact a specialty occupation. In his RFE response, previous counsel reiterated the job duties listed in the addendum to Form I-129, and stated that the duties that the beneficiary would perform would be similar to, if not the same as, those of a pharmacist.

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation. The director concluded that the duties of the

position as described in the petition resemble those of a nurse. The director found no requirement of a baccalaureate or higher degree for employment as a registered nurse in the *Occupational Outlook Handbook* (the "*Handbook*").

On appeal, counsel contends that the director erred in his characterization of the proposed position's duties as similar to those performed by a nurse. Counsel offers citations from the *Handbook* describing the tasks performed by pharmacists, as well as the qualifications required for entry into the profession. In short, counsel contends that the job duties of a Medications Monitoring Supervisor, other than the actual dispensing of drugs to patients, mirror those of a pharmacist. Therefore, counsel states, the proposed position's duties qualify for classification as a specialty occupation.

Counsel is correct when he asserts that the director erred in characterizing the nature of the proposed position's duties as similar to those performed by a nurse. The AAO compared the proposed job duties as described in the addendum to the Form I-129, the petitioner's letter of support, and previous counsel's RFE response to those of a nurse as set forth in the *Handbook* and determined that they are indeed distinct. The AAO accordingly withdraws the director's erroneous finding that the duties as set forth in the petition mirror those of a nurse.

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

In the instant case, the petitioner entitled the position "Medications Monitoring Supervisor." The petitioner stated that the proposed duties would mirror those of a pharmacist.

The AAO agrees with counsel's contention that the position of pharmacist qualifies for classification as an H-1B specialty occupation. A degree in pharmacy is normally required for entry into the profession, so the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A) is satisfied. Therefore, the position qualifies for H-1B classification. The petition may not be approved, however, as the beneficiary does not appear to be qualified to perform the duties of the specialty occupation. As the director did not address this issue, the petition will be remanded for further action.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record contains a copy of the beneficiary's Bachelor of Science in Pharmacy from the University of Santo Tomas, which is located in the Philippines, dated March 23, 1992. Her transcript is enclosed as well. The record also contains an evaluation from Education Evaluators International, Inc., dated October 11, 2003, which concludes that the beneficiary's foreign degree is equivalent to a Bachelor of Science in Pharmaceutical Studies from a regionally accredited college or university in the United States. The beneficiary appears to satisfy the second prong of this requirement.

Nevertheless, section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires.

Pursuant to 8 C.F.R. § 214.2(h)(v), if the State requires licensure in order to work in the specialty occupation, the beneficiary must possess the license prior to approval of the H-1B petition:

(A) General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) Temporary licensure. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) Duties without licensure. In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director

shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

(D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.

(E) Limitation on approval of petition. Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

According to the 2005-2005 edition of the *Handbook*:

[a] license is required to practice pharmacy in all States, the District of Columbia, and U.S. territories. To obtain a license, one must graduate from a college of pharmacy accredited by the American Council on Pharmaceutical Education (ACPE) and pass an examination. All States except California require the North American Pharmacist Licensure Exam (NAPLEX) and the Multistate Pharmacy Jurisprudence Exam (MPJE), both administered by the National Association of Boards of Pharmacy. California has its own pharmacist licensure exam.

The requirements for licensure in California for persons who hold foreign pharmacy degrees can be found at the website of the California Board of Pharmacy:¹

Becoming Licensed as a Pharmacist in California:

To qualify for licensure as a pharmacist, applicants must:

- a. Be certified by the FPGEC [Foreign Pharmacy Graduate Equivalency Committee] if they are a graduate of a foreign school of pharmacy
- b. Possess a social security number...
- c. Pass the California Pharmacist Jurisprudence Examination (CPJE)
- d. Pass the North American Pharmacist Licensure Examination (NAPLEX) after January 1, 2004.

¹ California Board of Pharmacy, *Apply for a Personal License*, http://www.pharmacy.ca.gov/licensing/personal_licenses.htm; *select* Click here for more information regarding foreign pharmacy graduates (accessed April 12, 2005).

The record does not reflect that the beneficiary possesses licensure to practice pharmacy in California. Nor does it appear that the beneficiary passed any of the requisite tests required in order to achieve California licensure. It also does not appear that temporary licensure in pharmacy, as contemplated by the regulations, is available in California.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

As the director has not addressed this issue, the decision will be withdrawn. The petition will be remanded for the director to enter a new decision. The director must afford the petitioner reasonable time to provide evidence relevant to the issue of the beneficiary's qualifications for the position, as well any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's February 4, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.